

## INTERNATIONALLY PROTECTED PERSONS: THE STATUS OF CONSULAR EMPLOYEES

Ryan Liss<sup>1</sup>

This memorandum considers whether consular employees and their family members constitute “internationally protected persons” (IPPs) under 18 U.S.C. § 112. In addition, the memorandum briefly considers whether an assault against the child of a consular employee abroad meets the jurisdictional nexus requirements of 18 U.S.C. § 112, such that the assault could be prosecuted in U.S. courts. It concludes that existing U.S. and foreign law and state practice do not provide a definitive definition of IPPs that either clearly includes or excludes consular employees. Moreover, the status of a consular employee’s child is similarly unclear, as the status of consular employees’ family members depends on that of the employee. However, while a definitive answer is not provided, the *travaux préparatoires* of the relevant treaties and one U.S. decision at least suggest that consular employees are excluded from the definition of IPPs.

Part I explains that the applicable U.S. statutory provisions do not provide an exhaustive definition of who constitutes an IPP. The statute relies instead on the definition of IPPs at international law. In addition, there are no U.S. cases directly on point, so the existing case law does not foreclose the possibility that a consular employee might qualify as an IPP. However, the court’s logic in one case, *United States v. Marcano-Garcia*,<sup>2</sup> which relied on the assault victim’s status as honorary consul under the Vienna Convention on Consular Relations in determining his IPP status, suggests that a consular employee would not fall within the definition. The exclusion of consular employees from the definition of IPPs is also arguably supported by the international treaties that 18 U.S.C. § 112 was drafted to implement, as well as those treaties’ *travaux préparatoires*.

Part II looks to foreign and international law. There are indications in statements made via United Nations reporting processes that some states regard themselves as obligated to protect consular employees. But these statements are vague and are not supported by a similar trend in foreign domestic legislation or foreign case law.

Part III shows that even if a consular employee and his or her child qualify as IPPs, the jurisdictional nexus under 18 U.S.C. § 112 must be met. For American courts to exercise jurisdiction in this case, the provision requires that the accused either be a U.S. national or be present on U.S. territory.

Having concluded that the law does not support a definitive conclusion regarding whether a consular employee qualifies as an IPP, Part IV concludes by discussing policy

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<sup>1</sup> L.L.M. Candidate, Yale Law School. This report was prepared in connection with *International Law and Foreign Affairs*, a course at Yale Law School, under the supervision of Professor Oona Hathaway, Gerard C. and Bernice Latrobe Smith Professor of International Law, Yale Law School, and with the assistance of Spencer Amdur, Julia Brower, Carlton Forbes, Christina Koningisor, Aadhithi Padmanabhan, Michael Shih, Tina Thomas, and Jacob Victor.

<sup>2</sup> 622 F.2d 12, 15 (1st Cir. 1980).

considerations both in favor of and against extending such protection to consular employees.

## I. Applicable U.S. Statutes and Case Law

### A. 18 U.S.C. §§ 112 and 1116 and the Treaties They Implement

Section 112 of 18 U.S.C. criminalizes assault against internationally protected persons,<sup>3</sup> and grants the United States jurisdiction over such offenses committed abroad if certain conditions are met.<sup>4</sup> The statute does not provide an exhaustive definition of IPPs; instead, the relevant provision indicates that the term includes, “a Chief of State . . . head of government, or Foreign Minister,” as well as:

[A]ny . . . representative, officer, employee or agent of the United States Government . . . who at the time and place concerned is *entitled pursuant to international law* to special protection . . . and any member of his family then forming part of his household.<sup>5</sup>

Thus, the definition of IPPs under the statute turns on who is entitled to protection “pursuant to international law.” As the above excerpt indicates, the definition of IPPs includes both the individual directly entitled to protection and any family members forming part of his or her household. Thus, whether a consular employee’s child is an IPP turns entirely on the status of the employee. While it is clear that “consular officers,” for example, are protected persons under international law, the status of *consular employees* is less certain.<sup>6</sup>

The IPP provisions were enacted in the Act for the Prevention and Punishment of Crimes Against Internationally Protected Persons<sup>7</sup> in order to implement U.S. obligations under the OAS Convention to Prevent and Punish Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion That Are of International Significance (“OAS Convention”),<sup>8</sup> and the UN Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents (“UN

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<sup>3</sup> 18 U.S.C. § 112(a) (2006) (see excerpt in Appendix).

<sup>4</sup> *Id.* § 112(e) (see excerpt in Appendix). These conditions are discussed further below.

<sup>5</sup> *Id.* §§ 112(c), 1116(b) (emphasis added) (see excerpt in Appendix).

<sup>6</sup> Vienna Convention on Consular Relations art. 41, *opened for signature* Apr. 18, 1961, 21 U.S.T. 77, 596 U.N.T.S. 261 (defining “consular officer” as “any person, including the head of a consular post, entrusted in that capacity with the exercise of consular functions” and “consular employee” as “any person employed in the administrative or technical service of a consular post”).

<sup>7</sup> Pub. L. No. 94-467, 90 Stat. 1997 (1976).

<sup>8</sup> OAS Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion That Are of International Significance, Feb. 2, 1971, 27 U.S.T. 3949, 1438 U.N.T.S. 191 [hereinafter OAS Convention].

Convention”).<sup>9</sup> States drafted these Conventions after a series of “terrorist attacks on diplomatic personnel,”<sup>10</sup> in order to codify international obligations to prevent and punish crimes committed against diplomats. States also viewed the Conventions as the first step in larger efforts to combat terrorism generally.<sup>11</sup>

The UN and OAS Conventions do not provide any greater clarity as to the definition of IPPs.<sup>12</sup> They rely on the same language as the implementing statute, defining IPPs as those persons entitled to special protection “pursuant to international law.”<sup>13</sup> However, the International Law Commission Commentaries on the Draft Articles of the UN Convention indicate that a broad definition was intended, stating that “the Commission decided in favour of the general formulation over an enumeration of the classes specified . . . as being the best means of effectuating the stated desire of the General Assembly for the broadest possible coverage.”<sup>14</sup> Further, the ILC Commentaries indicate that the intended scope of “special protection” was broader than the scope of diplomatic inviolability, observing that special protection “applies to all officials who are entitled to inviolability, as well as all others who are entitled to the somewhat more limited concept of protection.”<sup>15</sup> The Commentaries list the following as examples of those entitled to special protection under international agreements: “[D]iplomatic agents and members of the administrative and technical staff of the mission within the meaning of the Vienna Convention on Diplomatic Relations; [and] consular officers within the meaning of the Vienna Convention on Consular Relations . . .”<sup>16</sup> Significantly, this

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<sup>9</sup> UN Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, *opened for signature* Dec. 14, 1973, 28 U.S.T. 1975, 1035 U.N.T.S. 167 [hereinafter UN Convention]. See *United States v. Layton*, 509 F. Supp. 212, 221-223 (N.D. Cal. 1981), *appeal dismissed*, 645 F.2d 681 (9th Cir. 1981) (discussing the legislative history of the Act); see *Walter Dellinger, Assistant Attorney Gen., Memorandum from the Office of Legal Counsel to the Deputy Attorney Gen.* 4 (May 17, 1996), *available at* 1996 OLC Lexis 115 (same); see also *Von Dardel v. Union of Soviet Socialist Republics*, 623 F. Supp. 246, 261 (D.D.C. 1985), *vacated on other grounds*, 736 F. Supp. 1 (D.D.C. 1990) (discussing the historical context of the treaty).

<sup>10</sup> See Allen B. Green, Note, *Convention on the Prevention and Punishment of Crimes Against Diplomatic Agents and Other Internationally Protected Persons: An Analysis*, 14 VA. J. INT’L. L. 703, 703-704 (1974); see also International Law Commission, *Question of the Protection and Inviolability of Diplomatic Agents and Other Persons Entitled to Special Protection Under International Law*, [1972] 2 Y.B. Int’l L. Comm’n 309, 311, U.N. Doc. A/8710/Rev.1 [hereinafter ILC Report].

<sup>11</sup> ILC Report, *supra* note 10, at 311; Green, *supra* note 10, at 703 (“The [UN] Convention is . . . the first valid vehicle for deterring any sort of terrorist activity . . .”).

<sup>12</sup> The current definition of IPPs under international law is considered in Section IV. The UN and OAS Conventions are examined here, rather than Section IV, because this analysis provides useful context for understanding the drafting of the U.S. legislation.

<sup>13</sup> UN Convention, *supra* note 9, art. 1 (protecting those “entitled pursuant to international law to special protection from any attack on his person, freedom or dignity”); OAS Convention, *supra* note 8, art. 1 (protecting “those persons to whom the state has the duty according to international law to give special protection”).

<sup>14</sup> ILC Report, *supra* note 10, at 313.

<sup>15</sup> *Id.* This is significant insofar as, under the Vienna Convention on Consular Relations, “consular officers” are inviolable, while “consular employees” are not. Vienna Convention on Consular Relations, *supra* note 6, art. 41.

<sup>16</sup> ILC Report, *supra* note 10, at 314.

statement *excludes* consular employees.<sup>17</sup> This implies that, in the ILC’s view at the time of drafting, while diplomatic staff members were guaranteed special protection under existing international agreements, consular employees did not possess such status.<sup>18</sup>

### **B. U.S. Case Law**

U.S. courts have not squarely addressed whether a consular employee falls within the definition of an IPP. In *United States v. Marcano-Garcia*, the First Circuit held that an honorary consul qualified as an IPP, despite the fact that the Vienna Convention guaranteed an honorary consul less protection than a career consul.<sup>19</sup> Notably, however, an honorary consul is still guaranteed *some* protection under the Vienna Convention.<sup>20</sup> There is no comparable guarantee for a consular employee.<sup>21</sup> Thus, while *Marcano-Garcia* does not necessarily establish that a consular employee *does not* qualify as an IPP, the First Circuit’s reliance on the protections due an honorary consul under the Vienna Convention cuts against similar protection for consular employees. Other cases considering the term provide less guidance for the present purpose.<sup>22</sup>

## **II. Definition of Internationally Protected Persons under Foreign and International Law**

As the definitions in both the Conventions and the U.S. statute rely on international law to determine who is owed protection, current state practice may be instructive.<sup>23</sup> Despite the narrow language in the ILC Commentaries and the lack of

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<sup>17</sup> *Id.* at 311 (demonstrating a similar intention to focus on consular officers and not consular employees).

<sup>18</sup> See *supra* note 6 and accompanying text. It is worth noting that the ILC’s reading of “special protection” as only extending to “officers” is consistent with the Vienna Convention on Consular Relations. Vienna Convention on Consular Relations, *supra* note 6, art. 40.

<sup>19</sup> 622 F.2d 12, 15 (1st Cir. 1980) (“[W]e can discern no basis in the statute for distinguishing honorary from career consuls on the basis of the quantum of protection they are given under international law.”).

<sup>20</sup> See Vienna Convention on Consular Relations, *supra* note 6, art. 64 (“The receiving State is under a duty to accord to an honorary consular officer such protection as may be required by reason of his official position.”).

<sup>21</sup> Consular employees are guaranteed, for example, immunity from domestic civil suit and criminal prosecution with respect to conduct performed in the exercise of their consular function. *Id.* art. 43. However, immunity cannot be equated with a guarantee of protection.

<sup>22</sup> *United States v. Birk*, 797 F.2d 199, 201 (5th Cir. 1986) (explaining that the Chief Minister of an Indian state, visiting the United States for a medical procedure, was not an IPP); *Von Dardel v. Union of Soviet Socialist Republics*, 623 F. Supp. 246, 262 (D.D.C. 1985), *vacated on other grounds*, 736 F. Supp. 1 (D.D.C. 1990) (stating that “an accredited Swedish diplomat” was an IPP); *Kline v. El Salvador*, 603 F. Supp. 1313, 1320-21 (D.D.C. 1985) (indicating in dicta that there was no reason to believe a tourist was an IPP, while the Deputy Commander of the U.S. Military Assistance Group in a foreign country may be); *United States v. Layton*, 509 F. Supp. 212, 221 n.18 (N.D. Cal. 1981), *aff’d*, 645 F.2d 681 (9th Cir. 1981) (stating that there was “no dispute” that the U.S. Deputy Chief of Mission to Guyana “falls within the definition” of an IPP).

<sup>23</sup> Short of establishing customary international law, such state practice could also be evidence relevant to the interpretation of the Conventions themselves. Vienna Convention on the Law of Treaties, art. 31(3)(b), *opened for signature* May 23, 1969, 1155 U.N.T.S. 331.

precedent in U.S. case law, statements made in the course of United Nations reporting arguably suggest that some states are beginning to extend protection to consular employees. However, the relevant statements are vague and may simply be examples of imprecise reporting. Moreover, a review of foreign domestic legislation and case law does not provide evidence of a trend toward including consular employees in the scope of IPP.

This section will also briefly consider an excerpt from the International Court of Justice's decision concerning provisional measures in the *United States Diplomatic and Consular Staff in Tehran* case. This excerpt could be interpreted to support an obligation to provide protection to consular employees. However, the statement was effectively dicta, and I have not found any evidence that it has been subsequently invoked or followed.

#### ***A. Submissions to the UN Secretary-General***

In 1980, the UN General Assembly implemented procedures under which states are required to report serious violations of the obligation to protect "diplomatic and consular missions and representatives" to the Secretary-General.<sup>24</sup> In these submissions, some states have included references to the protection of consular employees or staff. Such statements may be indicative of a broadening scope of protection, or they may simply represent imprecision on the part of states parties. First, some of the statements made do not refer to the affected individual's official title, thus it is unclear precisely what position such individuals held. Second, the imprecision is accentuated by the use of the phrases "consular staff" and "diplomatic and consular missions and their staff" by various states. While "diplomatic staff" and "staff of the mission" are terms of art under the Vienna Convention on Diplomatic Relations,<sup>25</sup> the Vienna Convention on Consular Relations relies substantially on the terms "consular officers" and "consular employees."<sup>26</sup> The latter Convention does refer to "members of the consular staff"; however, the meaning of this phrase differs from that under the Diplomatic Convention. Notably, "members of the consular staff" includes consular officers and employees, but—unlike the Diplomatic Convention term—excludes the head of the consular post. As it seems doubtful that states would observe protection obligations for members of the consular post, but not the head of the post, state reports are likely not using this term as defined in the Convention. However, for the sake of completeness, this memorandum

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<sup>24</sup> *Consideration of Effective Measures to Enhance the Protection, Security and Safety of Diplomatic and Consular Missions and Representatives*, G.A. Res. 35/168, U.N. GAOR, 35th Sess., Supp. No. 48, U.N. Doc. A/RES/35/168 (Dec. 15, 1980).

<sup>25</sup> Vienna Convention on Diplomatic Relations art. 1, *opened for signature* Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95. Notably, "staff of the mission" under the Vienna Convention on Diplomatic Relations includes diplomatic staff, as well as administrative and technical staff, who, in the consular context, would qualify as "consular employees" under the Vienna Convention on Consular Relations. In contrast, the phrase "diplomatic staff" includes only those members of the mission having diplomatic rank, which, in the consular context, would not include consular employees.

<sup>26</sup> Vienna Convention on Consular Relations, *supra* note 6, art. 1.

will note references to consular staff, though such references may not be directly on point.

The most relevant statements, for the purpose of this memorandum, refer directly to the protection of “consular employees.” I have only found one statement falling into this category. In the June 2001 report, Turkey responded to concerns previously raised by Greece regarding the protection of a Greek consular employee, stating, “According to the investigation conducted at the residence of Mrs. Ek. [sic] Grabovitis, an employee of the Greek Consulate General in Istanbul, it was determined that an attempt was made to break the locks and to enter the apartment. Nothing has been stolen.”<sup>27</sup>

More common are statements referring to specific incidents involving consular “staff members.” For example, in the September 1991 report, Israel submitted that “[o]n the morning of 14 February 1991, a car belonging to a staff member of the Consulate of Israel in Istanbul, Turkey, was damaged by a ‘LOW’ missile.”<sup>28</sup> Similarly, in the July 2002 report, Norway stated that “[t]he Consulate General reported that someone had tried to steal a car belonging to a staff member during the night.”<sup>29</sup> In the Secretary-General’s July 2010 report, Iran noted various incidents concerning “staff members” of its consulates in Iraq.<sup>30</sup> Likewise, Mexico, in the September 2010 report, noted that “The Office of the Attorney General of the Republic in the State of Chihuahua opened an investigation into the homicide, on 13 March 2010, of Lesley A. Enríquez, a staff member at the Consulate of the United States in Ciudad Juárez.”<sup>31</sup> Other statements referring to consular staff involved incidents that took place on consular premises, thus, it

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<sup>27</sup> U.N. Secretary-General, *Consideration of Effective Measures to Enhance the Protection, Security and Safety of Diplomatic and Consular Missions and Representatives: Rep. of the Secretary-General*, ¶ 8, U.N. Doc. A/INF/56/6 (June 22, 2001); see also U.N. Secretary-General, *Consideration of Effective Measures to Enhance the Protection, Security and Safety of Diplomatic and Consular Missions and Representatives: Rep. of the Secretary-General*, ¶ 11, U.N. Doc. A/55/164 (July 18, 2000) (quoting Greek statements concerning the same incident).

<sup>28</sup> U.N. Secretary-General, *Consideration of Effective Measures to Enhance the Protection, Security and Safety of Diplomatic and Consular Missions and Representatives: Rep. of the Secretary-General*, ¶ 19, U.N. Doc. A/INF/46/4 (Sept. 30, 1991).

<sup>29</sup> U.N. Secretary-General, *Consideration of Effective Measures to Enhance the Protection, Security and Safety of Diplomatic and Consular Missions and Representatives: Rep. of the Secretary-General*, ¶ 10, U.N. Doc. A/57/99 (June 26, 2002).

<sup>30</sup> U.N. Secretary-General, *Consideration of Effective Measures to Enhance the Protection, Security and Safety of Diplomatic and Consular Missions and Representatives: Rep. of the Secretary-General*, ¶ 9, U.N. Doc. A/65/112 (July 6, 2010) (“On 11 January 2008, four staff members of the Consulate General of the Islamic Republic of Iran in Basra, together with four security guards of the Consulate General, were detained by foreign forces. On 13 April 2008, two staff members of the Consulate General of the Islamic Republic of Iran in Basra were detained by the Iraqi and United States troops on the Baghdad-Basra road. On 2 July 2008, British and United States troops launched measures interfering with the movements of the staff members of the Consulate General of the Islamic Republic of Iran in Basra and their families, particularly at the Shalamcheh border.”).

<sup>31</sup> U.N. Secretary-General, *Consideration of Effective Measures to Enhance the Protection, Security and Safety of Diplomatic and Consular Missions and Representatives: Rep. of the Secretary-General Addendum*, ¶ 9, U.N. Doc. A/65/112/Add.1 (Sept. 29, 2010).

is unclear whether the reporting obligation was seen to flow from the involvement of consular staff or from the duty to protect the consulate itself.<sup>32</sup>

Finally, some statements have included a general reference to the obligation to protect “consular staff” (as noted above, the precise definition of this term as used in states’ reports is unclear<sup>33</sup>). In the Secretary-General’s September 1995 report, Peru referenced Ecuador’s failure “to fulfill its obligation to protect consular staff in accordance with the Vienna Conventions on Diplomatic and Consular Relations . . . ”<sup>34</sup> Austria, in the September 2008 report, referred to its own obligations to “prevent any attack against the staff of diplomatic missions and consulates.”<sup>35</sup> In the September 2010 report, Burkina Faso stated that it was “aware of its duty to ensure the security, safety and protection of the various diplomatic and consular missions and their staff throughout the country . . . ”<sup>36</sup> In the July 2010 report, Australia similarly stated that “[t]he Australian Government takes seriously its obligations under the Vienna Convention on Diplomatic and Consular Relations for the protection of all diplomatic and consular missions and their staff.”<sup>37</sup>

### ***B. Survey of Foreign Implementing Legislation***

The possible trend demonstrated in the Secretary-General’s reports toward expanding the scope of IPPs to include consular employees has not been supported by a shift in domestic legislation implementing the OAS and UN Conventions. In fact, many states (in particular common law states) have adopted a similar definition to that provided in the U.S. legislation and the UN Convention, defining the category “pursuant to international law.”<sup>38</sup>

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<sup>32</sup> See, e.g., U.N. Secretary-General, *Consideration of Effective Measures to Enhance the Protection, Security and Safety of Diplomatic and Consular Missions and Representatives: Rep. of the Secretary-General Addendum*, ¶ 2, U.N. Doc. A/55/164/Add.2 (Sept. 22, 2000) (Russian submissions concerning the Russian Consulate-General in New York); U.N. Secretary-General, *Consideration of Effective Measures to Enhance the Protection, Security and Safety of Diplomatic and Consular Missions and Representatives: Rep. of the Secretary-General Addendum*, ¶¶ 13, 22, U.N. Doc. A/49/295 (Aug. 5, 1994) (German and Turkish submissions concerning the Turkish Consulate-General in Munich)..

<sup>33</sup> See *supra* Part II.A, at 8-9.

<sup>34</sup> U.N. Secretary-General, *Consideration of Effective Measures to Enhance the Protection, Security and Safety of Diplomatic and Consular Missions and Representatives: Rep. of the Secretary-General Addendum*, ¶¶ 7, 20, U.N. Doc. A/INF/50/3 (Sept. 13, 1995) (describing the particular incident that lead to the comment as involving an assault against the “Administrative Secretary of the Peruvian Consulate”).

<sup>35</sup> U.N. Secretary-General, *Consideration of Effective Measures to Enhance the Protection, Security and Safety of Diplomatic and Consular Missions and Representatives: Rep. of the Secretary-General Addendum*, ¶ 22, U.N. Doc. A/63/121/Add.1 (Sept. 26, 2008).

<sup>36</sup> U.N. Secretary-General Rep., Sept. 29, 2010, *supra* note 32, ¶ 2.

<sup>37</sup> U.N. Secretary-General Rep., July 6, 2010, *supra* note 31, ¶ 12.

<sup>38</sup> See, e.g., Criminal Code, R.S.C. 1985, c. C-46, §§ 2, 7(3) (Can.); Crimes (Internationally Protected Persons, United Nations and Associated Personnel, and Hostages) Act 1980, § 2(1), as amended by Crimes (Internationally Protected Persons, United Nations and Associated Personnel, and Hostages) Amendment Act of 1998, § 3 (1998 No. 36) (N.Z.); Internationally Protected Persons Act, 1978, c. 17, § 1(5)(b) (U.K.); Internationally Protected Persons and Taking of Hostages Ordinance, (1995) Cap. 468, 20, § 2(b) (H.K.).

Of all the states that referred to the protection of consular employees or staff in the Secretary-General's reports, the Australian implementing legislation presents the most interesting case. The Australian parliament changed the statutory definition of who constitutes an IPP in 1995. Prior to 1995, the statute did not define IPP, but instead provided that terms in the Act had the same meanings as those in the UN Convention.<sup>39</sup> The 1995 amendments added an “extended meaning of internationally protected persons,” which included “a prescribed representative or official of [a foreign state]” and his or her family members.<sup>40</sup> From my review of Australian regulations, there is no public regulation in force “prescribing” which representatives or officials are included in this definition. Without this regulation, it is difficult to make a definitive conclusion as to whether the amendments expand the definition of IPPs. Intuitively, it seems the category of “representatives or officials” is not broader than that defined by consular officers.

Considering, briefly, the legislation implemented by the other states discussed above, there is not a clear trend toward inclusion of consular employees within the statutory definition of IPPs. For example, Sri Lanka relies on a similar formulation as the U.S. statute,<sup>41</sup> as does Norway.<sup>42</sup> Peru’s criminal code does not include any reference to heads of state or any classes of protection as the first half of the U.S. provision does; rather, it mirrors the second half of the U.S. provision, which refers only to persons enjoying protection “pursuant to international law.”<sup>43</sup> The Austrian Penal Code does not define the term.<sup>44</sup> Iran’s legislation is vague on the issue, referring to offenses concerning “a foreign head of state or the diplomatic representative of a foreign country.”<sup>45</sup> The Iranian provision does not refer to “internationally protected persons” or to consular representatives.<sup>46</sup> The Turkish legislation, likewise, does not provide any direct guidance on the issue, referring to offenses against the “temporary or permanent representatives of foreign countries in Turkey, or the foreign personnel with diplomatic immunity.”<sup>47</sup> The

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<sup>39</sup> *Crimes (Internationally Protected Persons) Act 1976* (Cth) as amended, taking into account amendments up to Act No. 196 of 1992, § 3(3) (Austl.); *R. v Donyadideh & Ors.*, 114 FLR 43, 46 (Austl.) (“Article 1 of the [UN Convention] defines the term ‘internationally protected person’. It is not necessary to set out the definition here. There is no definition of the term in the body of the IPP Act.”).

<sup>40</sup> *Crimes (Internationally Protected Persons) Act 1976* (Cth), § 3A(2)(b), (e) (Austl.). The definition also provides protection to prescribed officials of “prescribed designated overseas missions.” *Id* § 3A(2)(d).

<sup>41</sup> See Prevention and Punishment of Crimes Against Internationally Protected Persons Act (Act No. 15/1991) § 10 (Sri Lanka).

<sup>42</sup> See Lov om straff (straffeloven) (2011), § 144 (Norway) (referring to “et statsoverhode, en regjeringsjef, en utenriksminister eller en annen internasjonalt beskyttet person,” which translates to “a head of state, or government, a foreign minister or other internationally protected person”).

<sup>43</sup> See Código Penal [CÓD. PEN.] [CRIMINAL CODE], art. 336 (Peru). Note that Article 335 also provides that it is an offence to “violate the immunity” of a head of state or diplomat agent. *Id.* art. 336.

<sup>44</sup> STRAFGESETZBUCH [STGB] [PENAL CODE] BUNDESGESETZBLATT [BGBL] No. 23/1974, § 278d(1)(3) (Austria) (referring to the offense of providing financial support for an offence against “internationally protected persons,” without defining the term).

<sup>45</sup> See MAJMUASI QAVANINI JAZAI [CODE OF CRIMINAL LAW] Tehran 1370 [1991], arts. 516-517, *translation available at* <https://www.unodc.org/tldb/showDocument.do?documentUid=6418>.

<sup>46</sup> See *id.*

<sup>47</sup> TÜRK CEZA KANUNU [TURKISH CRIMINAL CODE], arts. 340, 342, *translation available at* <https://www.unodc.org/tldb/showDocument.do?documentUid=7680>.

explicit reference to protection for those with diplomatic immunity, and the lack of an equivalent reference to consular representatives at all, suggests that the provision excludes consular employees. Neither Mexico nor Burkina Faso has included provisions in their respective criminal codes dealing directly with the protection of internationally protected persons.<sup>48</sup> However, both these states are monist in their application of international law,<sup>49</sup> and therefore the UN Convention itself is directly applicable as domestic law.<sup>50</sup>

Ultimately, the implementing legislation reviewed above does not indicate that these states perceived consular employees to be included in the definition of IPPs. As the countries reviewed were those which reported incidents involving “consular staff” or employees to the Secretary-General, the lack of an expanded definition in their respective legislation supports the inference that the expanded definition in the reports was the result of imprecise reporting. Nevertheless, the legislation considered does not definitively foreclose the possibility of an expanded definition altogether (e.g., the legislation may not yet mirror the respective states’ view of international law, or there may be other states who perceive consular employees to be IPPs).

### C. Survey of Foreign and International Case Law

A survey of foreign case law likewise failed to provide support for a trend toward including consular employees in the definition of IPPs. Most cases concerned the protection of diplomatic agents,<sup>51</sup> consular officers,<sup>52</sup> or diplomatic and consular

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<sup>48</sup> But see Loi 043-96-ADP du 13 Novembre 1996 Portant Code Pénal, art. 177 (Burk. Faso) (criminalizing the offense of insult or threats against a head of state or diplomatic agent); Código Penal Federal [CPF] [Federal Criminal Code], as amended, Diario Oficial de la Federación [DO], art. 148, 14 de Agosto de 1931 (Mex.) (criminalizing the offense of “violating” the diplomatic immunity of a foreign sovereign or representative of a foreign country).

<sup>49</sup> UNIDROIT, *Report of Ad Hoc Working Group on Legislative Techniques for the Implementation of the Preliminary Draft Convention on Harmonised Substantive Rules Regarding Intermediated Securities*, 3, UNIDROIT Study LXXVIII, Doc. 26 (2006) [hereinafter UNIDROIT Report] (citing Mexico as an example of a monist state); U.N. Office on Drugs & Crime, *A Review of the Legal Regime Against Terrorism in West and Central Africa*, 24 (2008) (quoting Article 151 of the Burkina Faso Constitution, which provides that “international treaties or agreements duly ratified have, from the date of their publication, a superior authority to that of national legislation, pending reciprocity”).

<sup>50</sup> See Convención Sobre la Prevención y el Castigo de Delitos Contra Personas Internacionalmente Protegidas, Inclusive los Agentes Diplomaticos, Diario Oficial de la Federación [DO], 10 de Junio de 1980 (Mex.) (announcing Mexico’s ratification of the UN Convention in the Mexican gazettes); UNIDROIT Report, *supra* note 50, at 3.

<sup>51</sup> See, e.g., R. v Roche [2005] WASCA 4, ¶ 116 (Austl.) (noting the special protection afforded to “Members of the Embassy staff”); In re Al-Fawwaz, [2001] UKHL 69, [2002] 1 A.C. 556, ¶¶ 47, 53 (H.L.) (noting that, for crimes targeted at American diplomats and embassy staff, “[i]t is common ground that internationally protected persons were to be the victims of the conspiracy of which the appellants are accused”); R. v. Kevork, [1984] O.J. No. 929, ¶ 8 (Can. Ont. H.C.J.) (QL) (referring in dicta to the obligation to protect diplomats as internationally protected persons); Duff v R, (1979) 39 FLR 315, 356 (Austl.) (finding admissible the Attorney-General’s statement that a foreign representative in Australia qualifies as a diplomatic representative and as an IPP, as does his wife).

premises.<sup>53</sup> However, two cases, *R. v. Cranham* and *United States Diplomatic and Consular Staff in Tehran*, are worth further review.

Once again, the lack of a judicial precedent does not foreclose the possibility of a broadening scope of the definition of IPPs, but there is no support for such a trend evident from an initial survey of foreign cases. It should be noted, however, that this case law review was not exhaustive, since there is no comprehensive database of foreign jurisprudence.<sup>54</sup>

### 1. *R. v. Cranham*

One decision of the Ontario Court of Justice, *R. v. Cranham*,<sup>55</sup> is worth mentioning. The decision was an oral sentencing judgment from the lowest level of the provincial court; the previous decision on the conviction is not reported and only the sentencing judgment is available. In a comment made in dicta, the judge observed that the Crown prosecutor's requested sentence was not unreasonable, "considering that this offence of [the accused] involved internationally protected persons, consular staff of the Russian embassy."<sup>56</sup> While this comment initially appears to assume that consular staff are IPPs, it is important to note that the consular staff in question worked at the Russian embassy. The Vienna Convention on Diplomatic Relations protects all diplomatic staff, whether they exercise consular functions or not.<sup>57</sup> Thus, the status of such individuals as IPPs necessarily flowed from their affiliation with the embassy, not from their status as consular staff.

### 2. *Iran Hostage Case*

A short section in the ICJ's decision on provisional measures in *Diplomatic and Consular Staff in Tehran* arguably supports the extension of IPP status to consular employees. However, a review of the specific facts of the decision indicates that the discussion was dicta and does not provide a basis for extending IPP status.

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<sup>52</sup> See, e.g., *R. v. Maltby* (1986), 17 O.A.C. 363, 363 (Can. Ont. C.A.) (concerning, *inter alia*, the offense of threatening to murder an IPP, who was the Vice Consul of the Bahamian High Commission in Ottawa); Canada (Minister of Public Safety and Emergency Preparedness) v. XXXXX XXXXX XXXX, [2011] I.D.D. No. 16 (Can. Immigration and Refugee Bd.), ¶ 110 (observing that the Honorary Consul for Britain would fit within the definition of an internationally protected person without any analysis on this point).

<sup>53</sup> See, e.g., *Roche*, [2005] WASCA 4 (concerning a conspiracy to attack the Israeli embassy in Australia).

<sup>54</sup> The research methodology included a review of: foreign case law on Quicklaw and Westlaw, WorldLii.org, AustLii.ed.au, and CanLii.org, as well as any case law database for the countries reviewed in the preceding section available on Country-by-Country Guide to Foreign Law Research, YALE LAW SCHOOL, <http://library.law.yale.edu/research/guides/country-guide>. Both the English term "internationally protected persons" and the term used in the relevant translation of the UN Convention, if available, were used in each search. If a translation of the UN Convention was not available in the relevant language, an informal translation of the term was used.

<sup>55</sup> [2002] O.J. No. 5431 (Ont. C.J.) (QL).

<sup>56</sup> *Id.* ¶ 1.

<sup>57</sup> See ILC Report, *supra* note 10, at 314 (noting that even "members of the administrative and technical staff of the [diplomatic] mission" are IPPs).

Toward the end of its decision on provisional measures, the ICJ discusses the importance of diplomatic and consular relations and protection in sweeping terms:

[T]he unimpeded conduct of consular relations, which have also been established between peoples since ancient times, is no less important [than diplomatic relations] in the context of present-day international law . . . . [T]he privileges and immunities of consular officers and *consular employees*, and the inviolability of consular premises and archives, are similarly principles deep-rooted in international law . . . .<sup>58</sup>

Significantly, the court mentioned consular officers and employees individually, but did not distinguish between the degree of protection owed to each category. However, two observations indicate that this excerpt should not be relied upon for the premise that consular employees qualify as IPPs. First, the ICJ only referenced the privileges and immunities owed to such individuals. Privileges and immunities should not be conflated with protection.<sup>59</sup> While consular employees are guaranteed some degree of privileges and immunities under the Vienna Convention on Consular Relations, they are not guaranteed protection. Second, this comment by the ICJ was effectively dicta. As explained in the merits decision, all the consular representatives held hostage were members of the “Consular Section of the Mission,” and thus were IPPs by virtue of their status as members of the diplomatic staff.<sup>60</sup> Therefore, I would caution against relying on this excerpt from the ICJ’s decision to support any conclusion concerning the protection of consular employees.

### **III. Jurisdictional Nexus under 18 U.S.C. § 112**

Even if it can be established that a consular employee qualifies as an IPP, the incident would need to meet the jurisdictional nexus requirements of 18 U.S.C. § 112 to be prosecutable in a U.S. court. To support U.S. jurisdiction, the statute requires—in addition to the fact that the victim is an IPP—that either “(1) the victim is a

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<sup>58</sup> United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), Order, 1979 I.C.J. 7, ¶ 40 (Dec. 15) (emphasis added).

<sup>59</sup> See Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, 149 (Feb. 14) (van den Wyngaert, J., dissenting) (“The 1973 Convention is not about immunities from criminal proceedings in another State, but about the protection of the high foreign officials it enumerates when they are *victims* of certain acts of terrorism such as murder, kidnapping or other attacks on their person or liberty (Art. 2). It is not about procedural protections for these persons when they are themselves accused of being *perpetrators* of [crimes].”). In contrast to Judge van den Wyngaert, the majority found that a foreign minister was entitled to immunity from criminal prosecution; however, the majority did not rely on the existence of an obligation to protect such individuals from harm in coming to this conclusion. Thus, the majority’s decision does not dispute Judge van de Wyngaert’s assessment of the distinction between immunity and protection.

<sup>60</sup> United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), Judgment, 1980 I.C.J. 3, ¶ 22 (May 24). While attacks on other consulates were referenced in the decision, the hostages were all members of the embassy.

representative, officer, employee, or agent of the United States, (2) an offender is a national of the United States, or (3) an offender is afterwards found in the United States.”<sup>61</sup> For an incident concerning only the child of a consular employee, one of the other two factors would need to be met.

#### **IV. Policy Considerations and Recent Events**

While existing legislation and case law do not support the conclusion that consular employees qualify as IPPs, they do not foreclose such a conclusion either. In light of this uncertainty in the law, there may be policy considerations—accentuated by recent incidents at U.S. embassies and consulates around the world—that support the expansion of the class of IPPs. From preliminary news accounts, the recent attacks on the embassies and consulates of the United States and western European countries have been fairly indiscriminate, targeting employees alongside officers.<sup>62</sup> After the incident, the UN Security Council recently reminded states of the obligation to “protect diplomatic and consular property and personnel.”<sup>63</sup> In doing so, the Security Council did not distinguish between the various classes of personnel employed in diplomatic and consular roles.

Nevertheless, if the United States opted to support a definition of the term that included consular employees, this would require ensuring protection of consular employees on U.S. territory without any *guarantee* that reciprocal obligations would be observed elsewhere. Moreover, the decision to expand protection to consular employees raises additional challenges, as many holding such positions are nationals of the state where the consulate is located, rather than nationals of the consular state. Thus, at least for those consular employees, it is not immediately clear whether the logic requiring the protection of foreign consular officers, for instance, applies. However, on balance, it seems that the significance of the policy concerns in favor of extending protection to consular employees outweighs at least these initial considerations against extending protection.

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<sup>61</sup> 18 U.S.C. § 112(e).

<sup>62</sup> See Ban, *Security Council Condemn ‘in Strongest Terms’ Attack on US Consulate in Libya*, UN NEWS CENTRE, Sept. 12, 2012, available at <http://www.un.org/apps/news/story.asp?NewsID=42867&Cr=libya&Cr1=#.UFgYLI2GqSp> (observing that local consular employees were killed along with American diplomats).

<sup>63</sup> Press Release, Security Council, Security Council Press Statement on Attacks Against Diplomatic Premises, U.N. Press Release SC/10764 (Sept. 14, 2012).

## **APPENDIX** **Relevant Statutory Provisions**

### 18 U.S.C. § 112 (2006)

- (a) Whoever assaults, strikes, wounds, imprisons, or offers violence to an . . . internationally protected person . . . shall be fined under this title or imprisoned not more than ten years, or both.
- ...  
(c) For the purpose of this section . . . “internationally protected person” . . . shall have the same meanings as those provided in section 1116(b) of this title.
- ...  
(e) If the victim of an offense under subsection (a) is an internationally protected person outside the United States, the United States may exercise jurisdiction over the offense if (1) the victim is a representative, officer, employee, or agent of the United States, (2) an offender is a national of the United States, or (3) an offender is afterwards found in the United States.

### 18 U.S.C. § 1116 (2006)

- (b) For the purposes of this section:
- (4) “Internationally protected person” means—
- ...  
(A) a Chief of State or the political equivalent, head of government, or Foreign Minister whenever such person is in a country other than his own and any member of his family accompanying him; or  
(B) any other representative, officer, employee, or agent of the United States Government, a foreign government, or international organization who at the time and place concerned is entitled pursuant to international law to special protection against attack upon his person, freedom, or dignity, and any member of his family then forming part of his household.